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Supreme Court, U.S.
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No. 03-879

IN THE

Supreme Court of the United States

COMMISSIONER OF REVENUE FOR THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

H.J. WILSON COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has the authority to abrogate State sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl. 4.

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Petitioner, Commissioner of Revenue for the Commonwealth of Massachusetts ("Commonwealth"), submits this reply addressed to the new points raised in the brief in opposition filed by H.J. Wilson Company, Inc. ("H.J.Wilson").

ARGUMENT

The brief in opposition only raises two points, both addressing matters not raised in the Commonwealth's petition. Considered objectively, each point actually supports the Commonwealth's request to grant certiorari and hold the case until this Court decides Hood (No. 02-1606).

I. WAIVER OF SOVEREIGN IMMUNITY WAS NOT AN ISSUE DECIDED BY THE SIXTH CIRCUIT, AND IS NOT PRESENTLY BEFORE THIS COURT.[1]

H.J. Wilson first argues that waiver of immunity, an issue not decided by the Sixth Circuit, justifies denial of the petition for certiorari.

> The Sixth Circuit parsed the issues as follows:
>
> There are four questions lurking in this case, although not all of them are before us today: 1) is the Commissioner entitled to sovereign immunity; 2) is this matter a core proceeding; 3) related, is abstention appropriate; and 4) assuming sovereign immunity exists, did the Commissioner waive that immunity by filing Proofs of Claim against H.J. Wilson?

H.J.Wilson Company, Inc. v. Commisioner, 333 F.3d 666, 668 (6th Cir. 2003) [Commonwealth's petition, App. A, p. A-4].

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[1] We follow the courts below, and adopt the term "sovereign immunity."

The Sixth Circuit expressly limited its opinion to the first question, saying "[t]he question this court must answer is the first, whether or not the Commissioner is entitled to immunity from suits in bankruptcy." Id. at 668 [App. A-4]. Answering this question in the negative based on Hood, the Sixth Circuit then addressed the waiver issue and stated, "[b]ecause we hold that there is no sovereign immunity in this case, we make no holding as to waiver." Id. at 669 [App. A-4] (emphasis supplied).

The Sixth Circuit made no holding as to waiver because, under its decision in Hood, there was no sovereign immunity for the Commonwealth to waive. The materiality — indeed, the very existence — of the waiver issue depends on whether Hood's denial of sovereign immunity will be reversed or sustained by this Court. Thus, by contrast, the District Court, after upholding the Commonwealth's sovereign immunity, correctly went on to consider and, ultimately, to reject HJW's waiver argument.

> When a State files a proof of claim in a bankruptcy proceeding, the State waives its sovereign immunity only with respect to the adjudication of that particular claim.... HJW's claim for refund of corporate excise tax for the years 1987 to 1992 (the subject of this adversary proceeding) is not the same transaction or occurrence or claim as the Commonwealth's proof of claim for sales and use tax from September 1996 to March 1999 (the subject of the proof of claim). The taxes arise under different state statutes and from different time periods.

H.J.Wilson v. Commissioner of Revenue, 265 B.R. 917, 923 (M.D.Tenn. 2001) [Commonwealth's petition, App. D, p. A-15] (citation omitted).

H.J. Wilson misses the point when it argues that the Commonwealth waived sovereign immunity "regardless of the outcome of In Re Hood." Brief in opposition at 7. Exactly the opposite is true. The outcome of Hood will determine whether there is any sovereign immunity to waive. If the Court reverses the Sixth Circuit's decision in Hood, the District Court's ruling should be sustained, subject to any further consideration of the waiver issue that the Sixth Circuit chooses to undertake. On the other hand, if the Court upholds the Sixth Circuit's decision in Hood, in effect affirming the District Court's decision, the waiver issue will continue to be moot.

The present case should therefore be held until Hood is resolved.

The Commonwealth is compelled to note that, in connection with the waiver issue, H.J.Wilson improperly refers to matters that are not in the record. With respect to the Commonwealth's proofs of claim H.J.Wilson states as follows:

> The amended Proofs of Claim replaced the Commissioner's priority Proofs of Claim, which had asserted a priority claim of $1.7 million and a general unsecured claim of nearly $300,000 for unpaid sales and corporate excise taxes from 1996 through 1998.

Brief in opposition, page 4, para. 2.

But H.J.Wilson never introduced into evidence the "replaced" proofs of claim to which it adverts. As set forth in Fed.R.App.P. Rule 10(a), "[t]he contents of the record as it is presented to the circuit court determine and limit the issues that may be addressed on appeal." 20 Moore's Federal Practice 3rd §310.02[1] (Bender 2001).

The Commonwealth respectfully requests the Court to disregard H.J. Wilson's allusion to documents not in the record.

II. THE DELAY IN ADJUDICATING THE TAX REFUND WAS CAUSED BY H.J. WILSON'S OPPOSITION TO ABSTENTION, AN ISSUE NOT DECIDED BY THE SIXTH CIRCUIT AND NOT PRESENTLY BEFORE THIS COURT.

The brief in opposition mischaracterizes the Commonwealth's petition for certiorari as part of an ongoing pattern of delay in paying money rightfully due to H.J.Wilson. For example, H.J. Wilson asserts that "[t]he Commissioner has been fighting the reimbursement of H.J. Wilson's tax overpayment since 1991," and that the Commonwealth's petition for certiorari will "delay the Commissioner's payment of money it has owed to H.J.Wilson for nearly thirteen years." (Brief in opposition, pp. 7, 8.)[2]

H.J. Wilson's complaint and related documents presented to the Bankruptcy Court tell a different story. One part of the tax (approximately $398,197) was paid in August 1991, and the rest (approximately $700,759) was paid in September 1994.[3] After making each payment, H.J.Wilson timely applied for an abatement of the tax.[4] In October 1993 and April 1996, H.J. Wilson filed separate petitions with the Massachusetts Appellate Tax Board for review of the denial of each abatement application, and in June

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[2] Needless to say, the Commissioner does not agree that H.J.Wilson is entitled to a refund of the tax. No forum has yet ruled on the merits of H.J.Wilson's underlying request for abatement.

[3] Complaint, Joint Apx., Tab 4, pp. 15, 16, ¶¶ 21, 28.

[4] Complaint, Joint Apx., Tab 4, pp. 16, 17, ¶¶ 25, 29.

1996 the two cases were consolidated.[5] In March 1999, H.J.Wilson filed the voluntary petition commencing the bankruptcy case.[6]

Far from seeking to delay the adjudication of H.J. Wilson's tax refund claim, the Commonwealth requested the Bankruptcy Court to abstain from hearing this complaint so that the matter could proceed before the Appellate Tax Board.[7] Insisting that the Bankruptcy Court was the proper forum, H.J.Wilson vigorously opposed the abstention request in the Bankruptcy Court, in the District Court, and in the Court of Appeals. This litigation strategy, and not any action or omission by the Commonwealth, has prevented adjudication of the tax refund since August 2000, the date the complaint was filed.

H.J.Wilson elides these inconvenient facts in its brief in opposition. As with waiver, the vitality of the abstention issue depends on the outcome of Hood in this Court. If the Court reverses the Sixth's Circuit's decision in Hood and holds that sovereign immunity bars H.J.Wilson's complaint, there will be no occasion to decide the abstention issue (as the District Court concluded). On the other hand, if the Court upholds the Sixth Circuit's decision in Hood, it may be appropriate for the District Court to opine on the Commonwealth's abstention request as the Sixth Circuit directed.

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[5] Condon Aff., Joint Apx., Tab 8, p. 84, ¶¶ 4,5,6.

[6] Bankruptcy Court opinion, App. E, p. A-18.

[7] This relief was requested in the alternative. See (i) Motion of Defendant For Determination That This Adversary Proceeding Is Not A Core Proceeding, and (ii) Motion Of Defendant For Mandatory Abstention Or, In The Alternative, For Permissive Abstention. [Joint Apx., Tabs 10 and 11, pp. 118-121.]

The present case should therefore be held until Hood is resolved.

CONCLUSION

The Commonwealth's petition for certiorari should be held pending the Court's decision in Hood, No. 02-1606, and then disposed of as appropriate in light of the decision in that case

Respectfully submitted,

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